



Admissible Hearsay in Business Records: Section 69 of the Evidence Act 2008



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Proving Facts Using Business Records

The general prohibition against hearsay evidence is set out in section 59 of the *Evidence Act 2008* ('the Act'). The application of the rule ordinarily prevents parties in a proceeding from adducing into evidence any document to prove a fact asserted within the document.

For example, s 59 would operate to prevent a party from adducing the following evidence:

- a **map** to prove the distance between two particular geographical points on land (e.g., the distance between two towns, or the length of a harbour entrance through which ships navigate) (**Exhibit 1**);
- a **phone bill** to prove: (i) that a particular mobile phone was registered to a particular person; (ii) that certain calls were made from that phone to other phones at particular times, from particular locations, and for particular durations (**Exhibit 2**);
- a **patient's hospital records** containing various hospital staff's notes to prove: (i) the patient presented at the hospital's emergency department on a particular date; (ii) the patient had fresh contusions (bruising) on one side of her face; (iii) the patient was in pain; (iv) the patient stated that her husband had caused the contusions by punching her in the face a few times (**Exhibit 3**).

Each of these documents is characterisable as hearsay because: (1) it is evidence of a written **previous representation**; (2) **made by a person** (even if automatically computer-generated, human input into the automated process is likely to satisfy this aspect of the rule); (3) containing several **asserted facts**; (4) which facts were **intended to be asserted** by the maker of previous representation; and (5) the evidence is being **adduced to prove the asserted facts**. In each case, the evidence is therefore *prima facie* inadmissible by the operation of s 59. However, if the party proposing to adduce it can satisfy the court that an exception applies, the evidence can be admitted as hearsay.

Section 69 of the Act (**reproduced** over page) is an exception that potentially operates to allow such evidence to be admitted. It is more commonly referred to as the 'business records' exception to the rule against hearsay.

Exhibit 1 →

Exhibit 2 ↓

Exhibit 3 →

PATIENT NOTES

PATIENT NAME: Jane Smith

DATE OF ADMISSION: 1/12/18

Hospital Staff Notes:

- several contusions on left cheek near eye - swelling consistent with blunt force trauma
- patient complaining of pain
- patient says husband punched her several times in face

Evidence Act 2008

59 The hearsay rule—exclusion of hearsay evidence

- (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.
- (2) Such a fact is in this Part referred to as an **asserted fact**.
- (2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

Note

Subsection (2A) was inserted as a response to the decision of the Supreme Court of New South Wales in *R v Hannes* (2000) 158 FLR 359.

Elements of Hearsay (s 59)

- (1) a **previous representation**
- (2) **made by a person**
- (3) containing an **asserted fact**
- (4) **intended to be asserted** by the maker (objectively determined)
- (5) adduced by a party to **prove the asserted fact**

Rationale for the 'Business Records' Exception

To understand the rationale for allowing business records to be admitted as an exception to the hearsay rule, is necessary to remind oneself about the fundamental rationale for the general prohibition itself. Hearsay is generally inadmissible because it is potentially unreliable and is not able to be tested by the rigours of cross-examination. If it were to be admitted, the tribunal of fact is not in a position to assess whether the asserted facts contained in a previous representation are: (i) the truth (as the party adducing it would have everyone believe); or (ii) a self-serving fabrication. Accordingly, the general rule is to exclude everything of this nature to avoid this potential problem.

However, for some kinds of hearsay the potential problem of 'self-serving fabrications' is less of a concern, and so the need for a rule prohibiting such evidence is unnecessary. The general prohibition against hearsay may then cease to operate by creating an exception. The business records exception was created for this reason. Businesses are in the habit of generating documents containing information on a regular basis as part of their business activities. The people who create these documents record matters the accuracy of which the business depends on. The business records are typically created with the affairs of the business in mind, and not for some other ulterior motive. Reliability of the asserted facts contained in such documents is therefore not usually a concern.

Carve-Out

An important carve-out in s 69, designed to preserve of the operation of the general rule against hearsay, relates to documents created by businesses in contemplation of court proceedings.

Section 69(3)(a) provides that the business records exception does not apply to previous representations in business records which were '*prepared or obtained ... in contemplation of or in connection with*' court proceedings. Section 69(3)(b) provides similarly in relation to representations made in connection with an investigation relating to criminal proceedings.

These carve-outs are effectively an **exception to the exception** and reflect the concern that even businesses can sometimes create self-serving and unreliable documents, particularly where they are created for the purpose of advancing their own interests in court proceedings.

Section 69(3)(b) is the operating provision that effectively prevents a prosecutor in a criminal proceeding from tendering the entire police brief into evidence as a business record.

69 Exception—business records

- (1) This section applies to a document that—
 - (a) either—
 - (i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or
 - (ii) at any time was or formed part of such a record; and
 - (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made—
 - (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or
 - (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.
 - (3) Subsection (2) does not apply if the representation—
 - (a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or
 - (b) was made in connection with an investigation relating or leading to a criminal proceeding.
 - (4) If—
 - (a) the occurrence of an event of a particular kind is in question; and
 - (b) in the course of a business, a system has been followed of making and keeping a record of the occurrence of all events of that kind—

the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.
 - (5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

Notes

- 1 Sections 48, 49, 50, 146, 147 and 150(1) are relevant to the mode of proof, and authentication, of business records.
- 2 Section 182 of the Commonwealth Act gives section 69 of the Commonwealth Act a wider application in relation to Commonwealth records.

Elements of s 69

- (1) a **document** that:
 - is/was part of the **records**;
 - **belonging** to or **kept** by a person, body or organisation
 - in the **course of** or for the **purposes of a business**
- (2) contains a **previous representation** (which asserts a fact)
- (3) was **made** either:
 - i. by a person who had personal knowledge of the asserted fact (i.e. **first-hand hearsay**); **or**
 - ii. on the basis of information directly or indirectly supplied by such a person (i.e. **second-hand or more remote hearsay**)
- (4) was **not** made **contemplating court** or in **connection with criminal investigation**



Proving a Negative

Section 69 potentially allows parties to adduce a business record for the purposes of **proving something did not happen**. Section 69(4) provides that if a business has 'a system ... of making and keeping a record of the occurrence of events' of a certain kind, and that system was followed, 'the hearsay rule does not apply to evidence that tends to prove that there is no record kept ... of the occurrence of the event.'

Essentially this may permit the tribunal of fact to draw an inference that something did not occur because there is no record of the event, in circumstances where one would expect there to be a record of the event if it did indeed occur. This provision could be used to prove, for example:

- that a certain town does not exist because it is not on a map;
- that a certain telephone call was not made by a person from their mobile phone because it is not itemised on their phone bill;
- that a certain person did not attend a certain hospital because there is no relevant patient record.

Important Definitions

The Act provides definitions for some of the critical terms used in s 69. These suggest that the business records exception has a very broad ambit of application. These definitions include:

- a definition of **business** which includes virtually any kind of non-personal activity carried out by individuals, corporations or government entities;
- a definition of **document** which includes anything on with writing, maps, plans, drawings, photographs, and electronic files;
- a definition of **representation** which includes express and implied representations, and written and oral representations.

Dictionary

Part 1 - Definitions

document means any record of information, and includes—

- anything on which there is writing; or
- anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or
- anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- a map, plan, drawing or photograph;

Note

See also clause 8 of Part 2 of this Dictionary on the meaning of **document**.

representation includes—

- an express or implied representation (whether oral or in writing); or
- a representation to be inferred from conduct; or
- a representation not intended by its maker to be communicated to or seen by another person; or
- a representation not intended by its maker to be communicated to or seen by another person;

previous representation means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced;

Dictionary

Part 2 - Other expressions

1 References to businesses

- A reference in this Act to a business includes a reference to the following—
 - a profession, calling, occupation, trade or undertaking;
 - an activity engaged in or carried on by the Crown in any of its capacities;
 - an activity engaged in or carried on by the government of a foreign country;
 - an activity engaged in or carried on by a person or body holding office or exercising power under or because of the Commonwealth Constitution, an Australian law or a law of a foreign country, being an activity engaged in or carried on in the performance of the functions of the office or in the exercise of the power (otherwise than in a private capacity);
 - the proceedings of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament;
 - the proceedings of a legislature of a foreign country, including a House or committee (however described) of such a legislature.

- A reference in this Act to a business also includes a reference to—

- a business that is not engaged in or carried on for profit; or
- a business engaged in or carried on outside Australia.

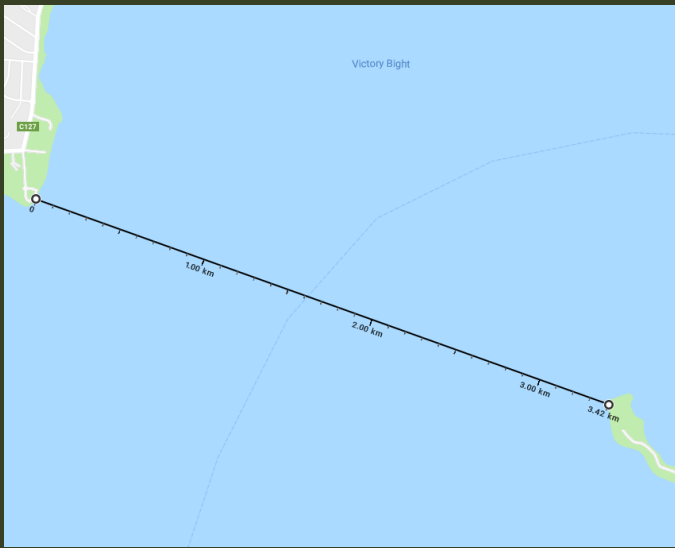
6 Representations in documents

For the purposes of this Act, a representation contained in a document is taken to have been made by a person if—

- the document was written, made or otherwise produced by the person; or
- the representation was recognised by the person as his or her representation by signing, initialling or otherwise marking the document.

Application of Section 69 to Sample Exhibits

Exhibit 1 (Map)



- The map was obtained from the website *www.maps.google.com.au*.
- The map is or was part of the electronic records belonging to Google, Inc. for the purposes of their electronic map library business.
- The map contains a previous representation, a drawing to scale with specified measurements, that asserts the distance of the entrance to Port Philip Bay is 3.42 km.
- The map was made on the basis of information supplied by a person, or more likely several persons, who might reasonably be supposed to have knowledge of what the map represents (including the scale used, and the distances between geographical points calculated).

Exhibit 2 (Phone Bill)

| | |
|---|---|
| Phone Home ABN 11 111 1111 111 TAX INVOICE FOR MR JOSEPH DOE 1 RANDOM LANE, MELBOURNE VIC 3000 | YOUR PHONE BILL Previous Balance \$0.00 Previous Bill \$99.00 Payments \$99.00 credit Mobil Phone 0400123456 \$99.00 TOTAL DUE 30 NOV 2018 \$99.00 Includes GST of \$9.00 |
|---|---|

BILLING PERIOD
11 October - 10 November 2018
BILL ISSUED 14 November 2018 **ACCOUNT NUMBER**
1234 56789 101112
BILL NUMBER
987 65432 210
CONTACT US
Call 13 00 00
For help with your bill, visit phonehome.com/yourbill

- The phone bill is automatically generated and sent electronically by Phone Home Pty Ltd.
- The phone bill is or was part of the electronic records belonging to Phone Home Pty Ltd for the purposes of their telecommunications service business.
- The phone bill contains previous representations which assert the name of the account holder, the mobile phone number, and the calls made for the October/November 2018 period.
- The phone bill was made on the basis of information supplied by Phone Home Pty Ltd and the account holder, who might reasonably be supposed to have knowledge of all these asserted facts based on use of the phone.

Exhibit 3 (Hospital Record)

| | |
|-----------------------|---|
| PATIENT NOTES | |
| PATIENT NAME: | Jane Smith |
| DATE OF ADMISSION: | 1/12/18 |
| Hospital Staff Notes: | |
| | - several contusions on left cheek near eye - swelling consistent with blunt force trauma |
| | - patient complaining of pain |
| | - patient says husband punched her several times in face |

- The patient notes are completed on a pro forma form by hospital staff at the Hospital.
- The document forms part of the records belonging to the Hospital, which is in the business of providing healthcare to the public.
- The documents contains a previous representations which assert the name of the patient, the date of admission, her injuries, and how she got them.
- The notes were made by Hospital staff on the basis of what they personally knew from their own observations, as well as on the basis of information supplied by the patient and by staff to one another.

Tendering the Document

While the criteria under s 69 may appear to be satisfied in relation to a document, there remains the issue of how the document is to be formally tendered into evidence. The main issues in this respect may be summarised as follows:

1. Does the party have to be put to the burden of calling a duly authorised person from the business that ultimately created the document to verify its authenticity (e.g., a Google, Inc. employee to authenticate the map)?
2. What if the document has been obtained from a non-party to the proceeding via subpoena or the third-party discovery process (e.g. the phone company answering a subpoena by attending court registry and handing over documents requested)?
3. Is it sufficient for a witness to be called (not employed by the business) to produce the document and give evidence which explains how they obtained it (e.g., a police officer who can say he attended the hospital and obtained the patient records)?
4. Could Counsel simply tender the document without any explanation as to how it was obtained (e.g. by handing up a print-out of the map)? Would that amount to giving evidence from the Bar table?

An underlying purpose of s 69 is to facilitate ease of proof. There are several other provisions of the Act which, when read with s 69, suggest that it is not necessary to call a person from the business to give evidence authenticating the record proposed to be tendered. In this regard, the following points may be made:

- The provisions of the Act are concerned with admissibility of evidence, not authenticity.
- Provided that the previous representations contained in the document are relevant (**ss 55, 56**), and the criteria in s 69 are satisfied, a court may draw reasonable inferences as to its authenticity and identity simply by examining it (**ss 58, 183**).
- If a document appears on its face to be an authentic business record, a party is entitled to adduce evidence of its contents by tendering it in its original form, a copy of it, or a print-out of its electronic form (**s 48**).
- The court may also take judicial notice of such matters (**ss 144, 146, 147**).

In many instances a document once admitted will 'prove itself' - there is no need for a witness to explain it. If there remains an issue with respect to its authenticity or the veracity of parts of its contents, other parties may raise objection. This may involve the invocation of other rules of evidence to exclude it (see over page) or inviting the tribunal of fact to reject the evidence if it is admitted.

Transcripts

Counsel should be aware that **transcripts** of audio recordings and audio-visual recordings are able to be tendered into evidence under s 48(1)(c), quite apart from the recordings themselves.

48 Proof of contents of documents

- (1) A party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the following methods—
 - (a) adducing evidence of an admission made by another party to the proceeding as to the contents of the document in question;
 - (b) tendering a document that—
 - (i) is or purports to be a copy of the document in question; and
 - (ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents;
 - (c) if the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing)—tendering a document that is or purports to be a transcript of the words;
 - (d) if the document in question is an article or thing on or in which information is stored in such a way that it cannot be used by the court unless a device is used to retrieve, produce or collate it—tendering a document that was or purports to have been produced by use of the device;
 - (e) tendering a document that—
 - (i) forms part of the records of or kept by a business (whether or not the business is still in existence); and
 - (ii) is or purports to be a copy of, or an extract from or a summary of, the document in question, or is or purports to be a copy of such an extract or summary;
 - (f) if the document in question is a public document—tendering a document that is or purports to be a copy of the document in question and that is or purports to have been printed—
 - (i) by a person authorised by or on behalf of the Government to print the document or by the Government Printer of the Commonwealth or by the government or official printer of another State or a Territory; or
 - (ii) by the authority of the Government or administration of the State, the Commonwealth, another State, a Territory or a foreign country; or
 - (iii) by authority of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament.
- (2) Subsection (1) applies to a document in question whether the document in question is available to the party or not.
- (3) If the party adduces evidence of the contents of a document under subsection (1)(a), the evidence may only be used—
 - (a) in respect of the party's case against the other party who made the admission concerned; or
 - (b) in respect of the other party's case against the party who adduced the evidence in that way.
- (4) A party may adduce evidence of the contents of a document in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by—
 - (a) tendering a document that is a copy of, or an extract from or summary of, the document in question; or
 - (b) adducing from a witness evidence of the contents of the document in question.

Notes

- 1 Clause 5 of Part 2 of the Dictionary is about the availability of documents.
- 2 Section 182 of the Commonwealth Act gives section 48 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

55 Relevant evidence

- (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
- (2) In particular, evidence is not taken to be irrelevant only because it relates only to—
 - (a) the credibility of a witness; or
 - (b) the admissibility of other evidence; or
 - (c) a failure to adduce evidence.

56 Relevant evidence to be admissible

- (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
- (2) Evidence that is not relevant in the proceeding is not admissible.

144 Matters of common knowledge

- (1) Proof is not required about knowledge that is not reasonably open to question and is—
 - (a) common knowledge in the locality in which the proceeding is being held or generally; or
 - (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
- (2) The judge may acquire knowledge of that kind in any way the judge thinks fit.
- (3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.
- (4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

146 Evidence produced by processes, machines and other devices

- (1) This section applies to a document or thing—
 - (a) that is produced wholly or partly by a device or process; and
 - (b) that is tendered by a party who asserts that, in producing the document or thing, the device or process has produced a particular outcome.
- (2) If it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document or thing on the occasion in question, the device or process produced that outcome.

Example

It would not be necessary to call evidence to prove that a photocopier normally produced complete copies of documents and that it was working properly when it was used to photocopy a particular document.

147 Documents produced by processes, machines and other devices in the course of business

- (1) This section applies to a document—
 - (a) that is produced wholly or partly by a device or process; and
 - (b) that is tendered by a party who asserts that, in producing the document, the device or process has produced a particular outcome.
- (2) If—
 - (a) the document is, or was at the time it was produced, part of the records of, or kept for the purposes of, a business (whether or not the business is still in existence); and
 - (b) the device or process is or was at that time used for the purposes of the business—

it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document on the occasion in question, the device or process

produced that outcome.

- (3) Subsection (2) does not apply to the contents of a document that was produced—
 - (a) for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or
 - (b) in connection with an investigation relating or leading to a criminal proceeding.

Note

Section 182 of the Commonwealth Act gives section 147 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

183 Inferences

If a question arises about the application of a provision of this Act in relation to a document or thing, the court may—

- (a) examine the document or thing; and
- (b) draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn.

Note

Section 182 of the Commonwealth Act gives section 183 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

Take care! These provisions are not Counsel's panacea for unreliable documentary evidence. Opposing counsel may still employ defensive measures.



Defensive Measures

Section 69 is not a pancea for unreliable documentary evidence. There are several provisions that can be invoked by opposing counsel for the purposes of attempting to mitigate the damage done or to exclude the hearsay evidence altogether. These include the following:

- **Requests to produce documents and call witnesses:** The Act specifically provides that the opposing party may make a request for the party adducing the hearsay evidence to produce a particular document for inspection and examination (e.g. the original record) or to call a witness responsible for the document for questioning (e.g. a relevant employee of the business that produced the document) (see **ss 166-169**). If the asserted facts contained in the business record are in dispute, these provisions should be invoked by the opposing party. There are time limits for making such requests, and consequences for the party proposing to adduce the s 69 evidence for not complying with a reasonable request.
- **Exclusion of opinion evidence:** The hearsay exception under s 69 permits the adduction of evidence of previous representations containing asserted facts. It does not create an exception for asserted opinions. Accordingly, unless an exception to the opinion rule applies (e.g. lay opinion or expert opinion), **s 76** of the Act can be invoked to exclude those parts of the business record containing expressions of opinion (as opposed to fact).
- **Discretionary & mandatory exclusions: Sections 135 and 137** are powerful and too often forgotten provisions that can be invoked in relation to evidence, including hearsay, which is unfairly prejudicial, misleading or confusing. **Section 136**, as an alternative, can be used to limit the use that can be made of the hearsay evidence.
- **Directions on unreliability:** Hearsay is always in danger of being unreliable evidence because it cannot be tested in cross-examination. Accordingly, directions can be sought under **s 165** of the Act (civil proceedings) or **s 32** of the **Jury Directions Act 2015** (criminal proceedings)

166 Definition of request

In this Division, request means a request that a party (the requesting party) makes to another party to do one or more of the following—

- (a) to produce to the requesting party the whole or a part of a specified document or thing;
- (b) to permit the requesting party, adequately and in an appropriate way, to examine, test or copy the whole or a part of a specified document or thing;
- (c) to call as a witness a specified person believed to be concerned in the production or maintenance of a specified document or thing;
- (d) to call as a witness a specified person in whose possession or under whose control a specified document or thing is believed to be or to have been at any time;
- (e) in relation to a document of the kind referred to in paragraph (b) or (c) of the definition of document in the Dictionary—to permit the requesting party, adequately and in an appropriate way, to examine and test the document and the

way in which it was produced and has been kept;

- (f) in relation to evidence of a previous representation—to call as a witness the person who made the previous representation;
- (g) in relation to evidence that a person has been convicted of an offence, being evidence to which section 92(2) applies—to call as a witness a person who gave evidence in the proceeding in which the person was so convicted.

167 Requests may be made about certain matters

A party may make a reasonable request to another party for the purpose of determining a question that relates to—

- (a) a previous representation; or
- (b) evidence of a conviction of a person for an offence; or
- (c) the authenticity, identity or admissibility of a document or thing.

168 Time limits for making certain requests

- (1) If a party has given to another party written notice of its intention to adduce evidence of a previous representation, the other party may only make a request to the party relating to the representation if the request is made within 21 days after the notice was given.
- (2) Despite subsection (1), the court may give the other party leave to make a request relating to the representation after the end of that 21 day period if it is satisfied that there is a good reason to do so.
- (3) If a party has given to another party written notice of its intention to adduce evidence of a person's conviction of an offence in order to prove a fact in issue, the other party may only make a request relating to evidence of the conviction if the request is made within 21 days after the notice is given.
- (4) Despite subsection (3), the court may give the other party leave to make a request relating to evidence of the conviction after the end of that 21 day period if it is satisfied that there is good reason to do so.
- (5) If a party has served on another party a copy of a document that it intends to tender in evidence, the other party may only make a request relating to the document if the request is made within 21 days after service of the copy.
- (6) If the copy of the document served under subsection (5) is accompanied by, or has endorsed on it, a notice stating that the document is to be tendered to prove the contents of another document, the other party may only make a request relating to the other document if the request is made within 21 days after service of the copy.
- (7) Despite subsections (5) and (6), the court may give the other party leave to make a request relating to the document, or other document, after the end of the 21 day period if it is satisfied that there is good reason to do so.

169 Failure or refusal to comply with requests

- (1) If the party has, without reasonable cause, failed or refused to comply with a request, the court may, on application, make one or more of the following orders—
 - (a) an order directing the party to comply with the request;
 - (b) an order that the party produce a specified document or thing, or call as a witness a specified person, as mentioned in section 166;
 - (c) an order that the evidence in relation to which the request was made is not to be admitted in evidence;
 - (d) such order with respect to adjournment or costs as is just.
- (2) If the party had, within a reasonable time after receiving the request, informed the other party that it refuses to comply with the request, any application under subsection (1) by the other party must be made within a reasonable time after being so informed.
- (3) The court may, on application, direct that evidence in relation to which a request was made is not to be admitted

in evidence if an order made by it under subsection (1)(a) or (b) is not complied with.

- (4) Without limiting the circumstances that may constitute reasonable cause for a party to fail to comply with a request, it is reasonable cause to fail to comply with a request if—
 - (a) the document or thing to be produced is not available to the party; or
 - (b) the existence and contents of the document are not in issue in the proceeding in which evidence of the document is proposed to be adduced; or
 - (c) the person to be called as a witness is not available.
- (5) Without limiting the matters that the court may take into account in relation to the exercise of a power under subsection (1), it is to take into account—
 - (a) the importance in the proceeding of the evidence in relation to which the request was made; and
 - (b) whether there is likely to be a dispute about the matter to which the evidence relates; and
 - (c) whether there is a reasonable doubt as to the authenticity or accuracy of the evidence that is, or the document the contents of which are, sought to be proved; and
 - (d) whether there is a reasonable doubt as to the authenticity of the document or thing that is sought to be tendered; and
 - (e) if the request relates to evidence of a previous representation—whether there is a reasonable doubt as to the accuracy of the representation or of the evidence on which it was based; and
 - (f) in the case of a request referred to in paragraph (g) of the definition of request in section 166—whether another person is available to give evidence about the conviction or the facts that were in issue in the proceeding in which the conviction was obtained; and
 - (g) whether compliance with the request would involve undue expense or delay or would not be reasonably practicable; and
 - (h) the nature of the proceeding.

...

76 The opinion rule

Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time; or
- (d) unnecessarily demean the deceased in a criminal proceeding for a homicide offence.

...

136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might—

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing.

137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.

165 Unreliable evidence

- (1) This section applies to evidence in a civil proceeding that is evidence of a kind that may be unreliable, including the following kinds of evidence—
 - (a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies;
 - (b) identification evidence;
 - (c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like;
- ***
- (g) in a proceeding against the estate of a deceased person—evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.

Note

Subsection (1) differs from section 165(1) of the Commonwealth Act and New South Wales Act

- (2) If there is a jury and a party so requests, the judge is to—
 - (a) warn the jury that the evidence may be unreliable; and
 - (b) inform the jury of matters that may cause it to be unreliable; and
 - (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.
- (3) The judge need not comply with subsection (2) if there are good reasons for not doing so.
- (4) It is not necessary that a particular form of words be used in giving the warning or information.
- (5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.
- (6) Subsection (2) does not permit a judge to warn or inform a jury in proceedings before it in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child. Any such warning or information may be given only in accordance with section 165A(2) and (3).

Note

This section applies only to civil proceedings. Divisions 3 and 4 of Part 4 of the **Jury Directions Act 2015** contain provisions relating to unreliable

Jury Directions Act 2015

32 Direction on unreliable evidence

- (1) The prosecution or defence counsel may request under section 12 that the trial judge direct the jury on evidence of a kind that may be unreliable.
- (2) In making a request referred to in subsection (1), the prosecution or defence counsel (as the case requires) must specify—
 - (a) the significant matters that may make the evidence unreliable; or
 - (b) if the request concerns evidence given by a child, the significant matters (other than solely the age of the child) that may make the evidence of the child unreliable.
- (3) In giving a direction referred to in subsection (1), the trial judge must—
 - (a) warn the jury that the evidence may be unreliable; and
 - (b) inform the jury of—
 - (i) the significant matters that the trial judge considers may cause the evidence to be unreliable; or
 - (ii) if the direction concerns evidence given by a child, the significant matters (other than solely the age of the child) that the trial judge considers may make the evidence of the child unreliable; and
 - (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

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